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IN THE

Supreme Court of the United States

October Term, 1951

No. 85

IDONAH SLADE PERKINS,

Petitioner,

v.

BENGUET CONSOLIDATED MINING COMPANY,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

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This Petition for Rehearing is respectfully addressed to the Court because Respondent believes the Court will, without question, want to correct a situation brought about by its Opinion of March 3, 1952, in this case which can result in nothing but a substantial, if not complete, injustice to the Respondent.

Respondent entirely agrees with the very lucid expressions by this court as to the principles of law which are to be borne in mind as to the demands and permissions of the due process clause of the 14th Amendment; and believes that the opinion of this Court on such principles will do much to remove the confusion which has existed in legal minds for some time.

The sole question presented to this Court, however, was whether or not the Supreme Court of Ohio was in error in applying the due process clause of the 14th Amendment of the Constitution of the United States to this case. The question of fact as to the nature and the extent of "doing business" was not before this Court for determination and was not argued, but this Court nevertheless proceeded to pass on it in such a manner as to be almost considered as a finding of fact. We do not believe that the Court intended to make such a finding nor do we believe that this Court intended (to paraphrase the statement from the opinion of Justice Minton) to "gratuitously advise" the Supreme Court of Ohio on the question of fact in this case. These facts were neither presented in their entirety, as there were numerous exhibits not actually before the court for consideration which could very probably have led to a different conclusion.

In its aforesaid opinion, this Court said that Rsepondent was "carrying on in Ohio, a continuous and systematic, but limited, part of its general business"; which findings are predicated upon what this Court stated in the opinion are "facts . . . substantially beyond controversy."

With this statement of the matter, Respondent is not and cannot in any wise be in agreement; and the Record before this Court, it is respectfully submitted, does not permit such a predicate or conclusion. Actually, the record facts are contrary to those pictured by this Court in its opinion. Not only are they to the contrary, but there was no evidence introduced which could place such contrary facts in dispute.

The Court fell into error in this situation by adopting as "facts . . . substantially beyond controversy" the recital appearing in the decision of the Court of Appeals of the State of Ohio in this case—88 O. A. at 119-125, 95 N. E. (2d) at 6-9. This recital by the Court of Appeals was not, how-

ever, as to facts proven "substantially beyond controversy" but was merely a recital of the *claims made* as to what the facts were—claims on the one hand by the Petitioner, and on the other hand by the Respondent. What this Court adopted as "undisputed facts" were practically the claims of the Petitioner; but these claims of the Petitioner, so far as the Record is concerned, were merely wishful thinking that they were so without evidence to substantiate them.

A reading of the Record before this Court will demonstrate beyond a reasonable doubt what Respondent asserts, and Respondent will proceed to demonstrate this from the Record; but before doing so, Respondent would like to say that it feels certain that this Court did not intend to make findings of fact to bind the Supreme Court of Ohio on the Remand to it, and also that the decision of this Court could just as well have been rendered on assumptions rather than as a result of attempting to find what the facts were.

The findings of facts made by this Court which are actually contrary to the record facts and which, being to the contrary, could not support this Court's holding of a "continuous and systematic, but limited" conducting in Ohio of "part of its general business" by Respondent, are as follows:

1. Respondent's President and General Manager was not Respondent's principal shareholder as this Court found.
   a. The record (p. 115), and which was not contradicted in any way, and could not be, shows him to be the owner of but 114,738 shares out of a total of 12,000,000 shares; that Allen & Company had purchased along before suit 2,203,600 shares of the stock from Haussermann family trusts (p. 125, 178); that Allen & Company had registered about 700,000 shares with the S.E.C. to be sold (R. p. 161, 179); that Petitioner herself claimed to be the

owner of more stock, 144,000 shares, than was owned by Respondent's President and General Manager; and that Respondent had about 10,000 stockholders (R. p. 122).

2. Respondent's President and General Manager spent less than half of his time in Ohio from 1941 to date of suit (the years during which he could not return to the Philippines because of the war).
   a. This was not contradicted in any way, and could not be.
   b. This absence from Ohio is inconsistent with what this Court has termed a *carrying on in Ohio* of a "continuous and systematic supervision of the necessarily limited wartime activities of the company."
   c. If we assume that this over 50% absence from Ohio from 1941 to date of suit occurred continuously from April, 1944 to the end of March, 1947, which is an assumption just as fair to make as any other, and the testimony was uncontradicted that for a long period Respondent's President and General Manager came to Ohio but for weekends, being pretty much in Washington or New York practically all of the time (R. p. 171), would this not be completely inconsistent with the Court's findings.

3. Respondent's files and records were not kept in the personal office in Ohio of its President and General Manager.
   a. The uncontradicted record (pp. 149, 153, 157, 158, 159, 162 and 163) were that such files and records of the Company as were in the possession at his home—not his office—during the war were returned to the Philippines in 1946, at war's end; and that all that the President and General Manager had at his personal office which belonged to Respondent were a few cancelled checks, a used check book stub, a check book and two unused check books (R. p. 171, 175).

4. This Court further finds that Respondent's President and General Manager carried on from his own personal office correspondence relating to the business of the Company and to its employees.
   a. It is true that correspondence was carried on with the employees of the company and with company's general counsel in Washington, and that other correspondence was carried on relating to the employees of the company, but we know of no record facts which show that Respondent's President and General Manager carried on "business correspondence" (R. pp. 148, 157, 158, 159, 163). All the files of Respondent's President and General Manager, which were in his private office in New Richmond, Ohio were brought to the Court pursuant to a subpoena (R. p. 148); and it is rather significant that no extracts from these files were ever made by petitioner to show "business correspondence" to the lower court, to the Court of Appeals or to the Ohio Supreme Court, and Respondent's President and General Manager was cross-examined at length on these files as the record will show. (Pages above.)
5. Respondent's President and General Manager had but one secretary, and not two, at and before suit. This is uncontradicted (R. p. 152). He did have to hire a secretary after the suits were filed to do a lot of copying. This one secretary which he had at and before suit was his own personal secretary for his personal business, and was a secretary of Respondent and paid from Respondent's funds only for a short while (R. pp. 150 and 208). Her salary then was not paid fully by Respondent, but one-half by Respondent and one-half by Balatoc Mining Company (R. p. 208). She was paid one-half from Respondent's funds only during the pendency of the application to register stock before the Securities and Exchange Commission (R. p. 150); which registration of stock was made on behalf of Allen and Company to sell 700,000 shares out of the stock of Respondent which

they owned (R. p. 161), and which registration was entirely at the expense of Allen & Company (R. p. 179).

6. No machinery, supplies or equipment were purchased in Ohio from any Ohio concern, and none were purchased by Respondent's President and General Manager because he knew nothing of these matters (R. pp. 103, 121, 132, 139).

7. No people having business with Benguet ever came to the personal office maintained by Respondent's President and General Manager, which personal office was maintained as his loafing place since years ago when he came on vacations to the United States (R. pp. 102, 170, 171).

8. There was no testimony that Respondent's President and General Manager, from his personal office in Ohio, or elsewhere in Ohio, supervised policies dealing with the rehabilitation of Respondent's properties in the Philippines.

   a. The only testimony on this score, is contained at pages 146 and 148 of the Record, and has not been contradicted in any way.

9. Respondent's President and General Manager has been a resident of the Philippines ever since 1898; was in the United States at time of suit only because of an exigency of the war and because he could not procure suitable transportation back to the Philippines—he did have such transportation to go back to the Philippines at the time of suit, which he had been endeavoring to procure since the war's end (R. pp. 98, 99, 124, 101). He had come here in 1941 merely on personal matters with reservations to return in late 1941 which were cancelled by our government, and he was then stranded here by reason of war (R. 99).

10. Respondent's President and General Manager was not in Ohio acting in that capacity as stated in the Opinion.

a. As stated in No. 9 above, he was in Ohio because that was the home which he maintained to come to during vacations from the Philippines where he had lived continuously since 1898, excepting for vacations. This is in no wise contradicted in the record.

b. In order that the President and General Manager might be in Ohio acting in that capacity, there would have had to be some business of the company in Ohio requiring his presence here in his said capacity to attend to; and yet there is not one iota of evidence that Respondent had any business whatsoever to be done in the State of Ohio or that Respondent's President and General Manager was here because any business of Respondent required him to be here.

Without going into any further details, we should like to again respectfully suggest that the decision of this Court in this case could just as well have been rendered by a mere assumption of the facts which this court proceeded to find rather than making a specific finding of facts which happen to be contrary to the Record.

The Supreme Court of Ohio never passed upon the question of whether or not the Respondent was doing business in the State of Ohio, and its decision was based entirely on the assumption that even if it were doing business in Ohio, suit could not be entertained against Respondent on a transitory cause of action because it was a foreign corporation. This Court has now said that there was no such prohibition generating from the due process clause. Therefore there was no necessity to find facts in order to correctly advise the Ohio Supreme Court in the present situation.

Respondent could probably go along with this Court's findings of facts if it had been so that Respondent had, prewar, conducted any part of its general business in the

United States or in Ohio, but this was never so; and Respondent could probably go along with the finding if its President and General Manager was customarily located in the State of Ohio, and there performing duties for Respondent. When the situation before the court is, however, that of an officer who has been living at the principal and only place of business of Respondent since 1898, and comes to this country on purely personal matters, and who is prevented from returning to the Philippines because of an act of war, it is difficult to conceive how the foreign corporation could be brought to whatever place he might happen to locate while unable to return to the place where he has lived for approximately forty years.

Respondent had no business in Ohio which required its President and General Manager to be in Ohio; and actually Respondent's President and General Manager was outside of the State of Ohio more than half of his time during the period in question.

The rationale of all of the decisions touching situations of this sort, which includes many, many decisions of this court which to this day stand unreversed, is that before a foreign corporation will be found to be present in the state where suit is brought, it must be found that the foreign corporation must have had something to be done in that state for which an officer of the corporation was there to represent it. As stated in *St. Clair* v. *Cox*, 106 U.S. 350, which case stands as a leading one on the subject to this day, before an officer of a company may be labeled as representing the foreign corporation in a state, the foreign corporation must have business in the state for the transaction of which it sends, or appoints, or maintains an agent there.

This court has repeatedly held that an officer of a corporation does not take the corporation with him wherever he goes

St. Clair v. *Cox*, 106 U. S. 350;
Remington v. *Central Railway Co.*, 198 U. S. 95;
Kendall v. *American Automatic Loom*, 198 U. S. 477;
Greene v. *C. B. & Q. Rwy. Co.*, 205 U. S. 530;
Riverside Mills v. *Menefee*, 237 U. S. 189;
Phila. & Rwy. Co. v. *McKibbin*, 243 U. S. 269;
Toledo Rwy. etc. Co. v. *Hill*, 244 U. S. 189;
Rosenberger v. *Brown*, 260 U. S. 516.

The rationale of the decisions of this court are very well put in the decision of the 5th Circuit Court of Appeals in the case of *Atchison, T. & S. F. RR. Co.* v. *Weeks*, 254 Fed. 513, cert. den. 248 U. S. 602, where it was said:

> "The doing of business which is entirely incidental to the main business especially if it be interstate in its character will not evidence an intention of the corporation to subject itself to the local laws. This may extend even to the maintenance of offices within the State and the employment of such clerical help as may be necessary without having such effect. *Greene* v. *C. B. & Q. Rwy. Co.*, 205 U. S. 530. . . .
>
> "The conclusion is reached that where a corporation is not undertaking to do within the state any of these things which it is incorporated to do, the only business done within the State being by a manager who gives direction for the operation of the business of the corporation in other States, using only the necessary clerical force to that end, and utilizing the United States mails and interstate transportation in the conveyance of directions, the corporation is not to be regarded as doing that character of business which would be equivalent to the presence within the state of the corporation, and which would be the essential basis for a personal judgment against the corporation within the state for a tort committed in another State."

The books are filled with cases, practically all of which are based on decisions of this Court, to the effect that the

doing of the following cannot be considered to be the "doing of business" within the state by a foreign corporation which would authorize or sustain service of process against the foreign corporation in an action in personam based on a transitory cause of action:

1. Buying machinery, supplies and equipment, even from an office maintained in a state by a foreign corporation does not constitute "doing business!"

   Rosenberger Bros. Inc. v. *Curtis Brown*, 260 U. S. 516.
   Macario v. *Alaska Mining Co.*, 165 PAC 73;
   Greenberg v. *Lamson Bros.*, 119 N. Y. 269;
   Bank of America v. *Whitney Central National Bank*, 261 U. S. 171, and many other cases.

2. Having a stock transfer agency, holding directors meetings, drawing on checking accounts, maintaining correspondence with company officials elsewhere, even if all done in an office in the state by a foreign corporation does not constitute "doing business" within that State;

   Consolidated Iron and Steel Co. v. *Maumee Iron and Steel Co.*, 284 Fed. 550;
   Honeyman v. *Colorado Fuel & Iron Co.*, 133 Fed. 96;
   People v. *Equitable Trust Co.*, 96 N. Y. 387;
   People v. *Horn Silver Mining Co.*, 105 N. Y. 76;
   People v. *Fitner*, 76 N. Y. S. 1017;
   Wadsworth v. *Equitable Trust Company*, 138 N. Y. S. 842;
   Warren Tool & Forge Co. v. *Marcus*, 39 Ohio App. 38;
   Dickey v. *Dayton Globe Iron Works Co.*, 19 Ohio N. P. (N. S.) 492;
   Atchison Topeka & S. F. RR. Co. v. *Weeks*, 254 Fed. 513; (CCA 5th Cir., cert. den. 248 U. S. 602);
   Green v. *C. B. & Q. RR. Co.*, 205 U. S. 530;
   Fletchers Cyclopedia on Corporations, Vol. 18, pages 346, 347 and 348;
   Barrow Steamship Co. v. *Kane*, 170 U. S. 111.

So much for the findings of facts and for the rationale of the decisions of this and other Courts. There is one

final matter, however, which we feel should be brought to the attention of this Court, and that is, that the instant cases came up from the lower court, the Common Pleas Court of Clermont County, Ohio, on an appeal merely on a question of law, and not on a question of law and fact, Petitioner having reduced her appeal to one on a question of law only (R. p. 210, under dates April 14 and May 6, 1949). Thus, a review of the facts by the Appellate Court of Ohio, and by the Ohio Supreme Court was limited to the very narrow issue as to whether, as a matter of law, the trier of the facts was wrong in the conclusion which he reached from the evidence before him that—

> "2. That John W. Hausserman, upon whom summons was attempted to be served, was not the managing agent of the defendant, Benguet Consolidated Mining Company, within the meaning of the Ohio statute governing service of process on foreign corporations.
>
> "3. That the defendant, Benguet Consolidated Mining Company, was not doing business in Ohio in such a sense or in such manner as to authorize a valid service of summons upon it under the laws of the State of Ohio; and that it had no business within Ohio requiring an agent in Ohio to manage and conduct the same" (R. pp. 10-11).

This is the Ohio practice; and it would seem to counsel for Respondent that this Court is bound by the limitations of the practice in Ohio to the same extent as the Court of Appeals of Ohio and the Supreme Court of Ohio. The Court of Appeals of Ohio, after reviewing the many decisions on the question of doing business, and the legal principles to be applied in determining as to whether or not there was such a doing of business as would permit the sustaining of process, had this to say:

> "It must be apparent that no useful purpose would be served by comparing or considering the host of authorities to be found upon this question. Enough

has been noted herein to indicate the general rules applicable and that essentially a factual issue is presented to the trier of facts, which in the cases before the court was the trial judge.

"The trial court upon such consideration of the evidence presented found in favor of the defendant upon the motion to quash. It cannot be said that his conclusion was contrary to law, or that, as a matter of law, he was in error in finding that the motions to quash should be sustained. His judgment is before this court, predicated upon the evidence before him. The record does not sustain the claim of the plaintiff that he was in error, either upon the law or the facts."

CONCLUSION

For the reasons above stated, we respectfully request that the Petition for Rehearing be granted, and that the Court modify its Opinion to assume facts and to omit any actual findings of facts.

Respectfully submitted,

LUCIEN H. MERCIER,
CHARLES G. WHITE,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent do hereby certify to this Court that this Petition for Rehearing is filed in good faith, in an earnest endeavor to correct a situation which might be of substantial, if not entire prejudice to Respondent, and in no way for the purpose of delay.

Done at Batavia, Ohio, this 12th day of March, 1952.

Lucien H. Mercier

LUCIEN H. MERCIER,

Charles G. White

CHARLES G. WHITE.